

March 20, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket Nos. 98-120, 00-96 and 00-2

Dear Mr. Chairman:

I am writing in response to the latest dual must carry/multicasting “proposal” submitted to you on February 27 by the Association of Public Television Stations (APTS), PBS and CPB (“public TV entities”). The proposal essentially repackages arguments to mandate carriage of public broadcasters’ analog and digital signals – including multicast digital programming – *prior to broadcasters’ return of the analog spectrum*.

The Commission previously concluded on a preliminary basis that a dual must carry requirement would be found unconstitutional. And it found that a multicasting carriage obligation would not be supported by the statute even after the end of the transition. Rather than repeat the entire set of legal and policy arguments that support these conclusions, we attach for your convenience links to copies of NCTA’s previous submissions on these subjects. The underlying arguments have not changed. What has changed since January 2001 is the fact that cable television operators have entered into a number of voluntary agreements to carry PTV stations’ digital TV signals, in addition to the stations’ analog signals, during the transition from analog to digital broadcasting.

As noted in the PTV entities’ letter, Time Warner Cable and Insight Communications have entered into company-wide agreements to carry public broadcasters’ DTV signals on upgraded systems in their markets. But the public TV entities’ letter understates the progress that has been made. It glosses over the fact that other cable operators, including Comcast and Cox, have entered into market-specific PTV carriage agreements in a number of cities including Boston, New York, Philadelphia, Washington, Detroit, Las Vegas, Phoenix, Omaha and San Diego. Not surprisingly, these agreements have been reached with some of the major producing public TV stations, including WGBH-TV, WNET and WETA. To date, public television digital signals have been rolled out over cable in more than one-third of the 73 top-100 DMA’s in which cable is offering HD programming. We expect more public TV signals and more markets to be

added in the months ahead, especially as more PTV stations make the transition to digital and increase their HD programming.¹

Cable operators view public TV programming as an important part of their digital programming mix. For this reason, operators have devoted considerable effort to trying to reach comprehensive carriage agreements with APTS. Regrettably, however, operators have found little or no flexibility in APTS' position with respect to issues surrounding the carriage of DTV signals in markets with multiple public TV stations. They have also found APTS unable to provide market-specific information about local PTV stations' programming plans. For these reasons, as they launch high definition programming, cable operators have embarked on local negotiations with PTV stations and found this to be a more productive way to reach carriage agreements. Such discussions also foster broader local relationships.

The continued availability of public television programming to cable customers during the transition is not at issue here. Public TV stations' analog programming is carried by every cable system in the United States where such stations' signals are available over-the-air. Cable systems often carry multiple public TV stations, sometimes as many as three or four analog PTV stations in a market. Thus, the sole issue is whether government should require the simultaneous carriage of additional – and often duplicative – digital signals from every PTV station before these stations return the analog spectrum.

Given the limits on cable's digital bandwidth, such a requirement is neither practicable nor in the interest of consumers during the transition to digital television. The cable industry has invested more than \$70 billion of private risk capital since 1996 to upgrade system capacities to add approximately 200 MHz of digital spectrum. The cost of adding this new digital bandwidth has been substantial. Every 6 MHz of new bandwidth created represents a \$2 billion-plus investment industry-wide by cable operators. Until analog capacity can be freed up, the real challenge for cable operators is how to allocate this valuable digital bandwidth among broadcast, digital cable, video-on-demand, HDTV, high speed data, cable telephony and other advanced broadband services. Part and parcel of this challenge is to offer services that consumers want in order to pay for this investment.

The public TV entities' proposal to cap, at 28 percent, the amount of cable capacity devoted to broadcast signal carriage does not reduce the legal and practical problems associated with a dual carriage obligation.² While characterizing their renewed call for dual carriage as a “new, more limited proposal ... [that] would not entail any additional burden for cable

¹ Public television stations are required to have a digital signal on the air by May 1, 2003. Today, fewer than one-third of the 357 public TV stations have begun transmitting a digital signal.

² The public TV proposal also curiously takes up the cause of commercial TV stations, arguing that commercial stations should be able to elect must carry or retransmission consent separately for both of their two signals. Public TV stations have no retransmission consent election rights, nor, to the best of our knowledge, do they operate commercial TV stations. Why they raise this issue remains unclear.

operators,” in fact a dual carriage requirement would represent a significant new burden, far in excess of the burden imposed by analog must carry that the Supreme Court considered in Turner. Contrary to the public TV entities’ argument, the percentage of channel capacity occupied by must carry broadcast stations was not the issue there. Rather, the Court examined the number of stations cable operators were forced to carry in addition to those that they were already carrying.³ Unlike the case with analog must carry, where cable operators already voluntarily carried most analog broadcast TV stations, that number would be multiplied if cable operators were required to carry every broadcaster’s digital channel, too.

In terms of spectrum, the burden’s onerousness is evident. A requirement to set aside 28 percent of a 750 MHz cable system’s capacity would equal 210 MHz of cable bandwidth. This is more than double the analog bandwidth that broadcasters occupy in most markets today. Under this supposedly “limited” proposal, broadcasters could occupy significantly more bandwidth – even if public tv stations come under the 28 percent cap – than they conceivably could have when Congress adopted an analog must carry requirement in 1992.⁴

The proposal for a cap on the percentage of capacity devoted to dual must carry does not alter the fundamental vulnerability of any such requirement under the First and Fifth Amendments. Nor does the proposal change the reality that a dual carriage or multicasting requirement would not serve any of the purposes approved by Congress in adopting analog must carry rules or upheld by the Court in Turner.

The public TV entities’ proposal is not saved by its claim that it would be merely “transitional” or that it would allegedly serve another purpose not set forth in the must carry statute – “propel[ling] the digital transition.” Upon examination, its proposal is “transitional” in theory only. The dual carriage proposal would “sunset” only when “all the systems’ subscribers that have digital receivers can view the station in digital and all of the system’s analog subscribers can view the station in analog through downconversion.” Very few digital television sets are currently in cable customers’ homes. Thus, the real price of freedom from PTV’s dual carriage proposal would be to force almost all cable customers to bear the cost of obtaining digital-to-analog converter boxes.

Nor would mandatory carriage of public TV digital signals during the transition – or prematurely forcing cable customers to obtain digital-to-analog converters – hasten the analog spectrum return date under the existing 85% test. Since cable systems rarely serve 85% of the households in a market, the analog spectrum return date hinges on the time when a sufficient number of households receiving television signals over-the-air or by satellite invest in (i) digital television sets or (ii) devices that make over-the-air digital signals viewable on an analog TV set. These over-the-air viewers are presumably the least interested in multichannel video television to

³ Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 215 (1997).

⁴ To illustrate, cable systems in 1992 typically were built to around 300–400 MHz; if fully 1/3 of capacity was occupied by commercial broadcasters and there were four PTV stations in addition (which is an extreme case), a total of 145 MHz would have been occupied on a 400 MHz system, 124 MHz on a 300 MHz system – nearly half what public TV proposes here.

The Honorable Michael K. Powell

March 20, 2003

Page 4

begin with, or those least able to afford expensive new television sets. And many satellite subscribers receive no local PTV signal at all. Thus, the day when public and commercial broadcasters will need to return their analog spectrum under the existing 85% test is distant, regardless of cable carriage during the transition.

The cable industry aims to do more than its share to advance the digital transition. It is providing high definition digital programming from broadcasters, including PTV stations, and from cable program networks to more and more customers in more and more communities. And it is reaching out to both public and commercial broadcasters to help find mutually acceptable ways to make this transition happen as smoothly as possible for viewers. But the public TV entities' dual must carry proposal would simply impose new costs on cable operators, programmers, and especially customers, without any benefits to the digital transition.

Respectfully submitted,

/s/ Jill Luckett

Jill Luckett

VP, Program Network Policy

/s/ Daniel L. Brenner

Daniel L. Brenner

/s/ Michael S. Schooler

Michael S. Schooler

/s/ Diane B. Burstein

Diane B. Burstein

Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

cc: Ms. Marlene H. Dortch (for inclusion in above-referenced dockets)

Attachments:

http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512568995

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